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Juridification, sovereignty and separation of powers

ROGER MASTERMAN*

Mark Bevir is right to highlight a number of similar concerns which underpin our respective views; equally he is right to note that our responses to these concerns differ. In suggesting that Bevir's article portrayed the juridification of the constitution as 'an incontrovertible and relentless' process, I did not mean to suggest that Bevir himself supported the fact that it should be so, as he seems to think. Rather, my suggestion was that the tone of Bevir's piece was one of resignation; a lament for the hopes of representative and – more saliently – participatory democracy in an increasingly judicio-centric constitution. It is on this basis that I suggest that Bevir treats law as being apart from politics; by appearing to suggest that the developments identified as 'juridification' are an unfortunate taint on the democratic or political process, rather than a necessary characteristic of a democracy under the rule of law. It is on this point that our differences are most apparent.

Bevir's scepticism over the increased role played by the judicial branch in scrutinising the actions of elected officials and bodies may, in part at least, be attributed to his apparent rejection of the idea of judicial independence. To legitimately fulfil their constitutional obligations, the independence of the judiciary must be preserved. Even though the British constitution has been argued to almost completely disregard the separation of powers in every other sense, the *institutional* separation of judiciary and executive is rightly seen as a constitutional fundamental; simply as a matter of procedural fairness, more widely as evidence of the resonance of the rule of law. Bevir however repeatedly suggests that the Labour government have been successful in their attempts to treat the courts as 'part of the policy-making process to be cajoled and coerced into backing its positions' and implies that the courts have allowed themselves to be manipulated in this manner.¹ In doing so he too exaggerates his case; by denying the courts the independence that is crucial to their role.

Bevir's point in this regard may however be clouded by his (mis)use of terminology. If his suggestion really is that the Labour *government* have contrived to sway the courts in this way, then the weight of available evidence points to a significant judicial resistance to be influenced by executive pressure, and a profound

awareness of the importance of preserving the institutional separation of the executive and judicial branch.² When, for example, the former Home Secretary Charles Clark suggested that judges and ministers might informally discuss the implementation and operation of the government's counter-terrorism policies, the response from the judges was terse: as Lord Steyn commented, 'Mr Clark apparently fails to understand that the Law Lords and Cabinet ministers are not on the same side.'³ Similar attacks by politicians on individual decisions and judges – which have been common in recent history – undermine the independence of the judicial branch, and undermine the rule of law in so doing. While I think we would both agree that the conduct of political and legal *processes* should not be treated as being entirely distinct, the *institutional* independence of the judicial branch should be considered a constitutional fundamental rather than the commodity of elected officials.

If however, Bevir is referring to the government as an encrypted term for *Parliament* – as a result of the former's domination of the latter – then he is equally mistaken. If the judges apply legislation furthering, say, human rights standards, then they do so, not as a result of having been 'cajoled and coerced' into so doing, but for the reason that it is their constitutional obligation to enforce the law as passed by Parliament. The executive branch may well play too great a role in the formulation and passage of legislative decisions, but executive authority alone does not grant such decisions the status of Acts of Parliament.

The concern that executive dominance of Parliament hampers that institution's ability to shape and modify legislative proposals is one that we share. Yet, 'juridification' in this regard is almost certainly not the problem; on the contrary, it may well provide a partial solution. The increased ability of the courts to check the exercise of executive power where Parliament has been unable to do so is evident throughout the recent history of judicial review.⁴ I concede on utilitarian grounds that the ability to bring a case to court may well be no substitute for more participatory and representative institutions of government, yet access to the courts undeniably provides an opportunity for groups and individuals to obtain redress where the political process has otherwise proved too remote or unwilling to address their concerns. The difficulty for Bevir in this regard – revealed in his views on s.19 of the Human Rights Act – is that the increased ability of the courts to scrutinise governmental decisions in turn prompts elected officials to show a growing tendency to 'think like judges.'

Such allegations are frequently levelled by critics of statutory bills of rights who assert that, despite the attempts of such instruments to reconcile the judicial interpretation of human rights standards with parliamentary democracy, the enforcement of such of statutes will nevertheless empower the judiciary at the expense of the elected branches. This is for the reason, it is argued, that legislators and politicians are increasingly driven to only propose solutions to policy questions that they believe will survive judicial scrutiny.⁵ Mark Bevir criticises my interpretation of the Human Rights Act 1998 for failing to acknowledge this danger. I have written elsewhere that the distinct position of the Human Rights Act and its relationship with the European Convention on Human Rights determines that there are many good institutional – and legal – reasons why the government and Parliament might chose to endorse a judicial reading of what the law requires for the protection of human rights.⁶ Yet, if elected politicians allow their actions and policies to be driven and shaped *only* by such ‘legal’ concerns – specifically the type which seek to second-guess how the courts might respond to certain policy initiatives – then they abdicate their own constitutional responsibility. The executive branch should resist this potential judicialisation of their techniques of policy design and implementation, and should themselves shoulder the responsibility for preserving the institutional separation of power, for in failing to do so they give credence to the suggestion that ‘juridification’ is in fact a self-perpetuating and inexorable process.

The continuing validity of the sovereignty doctrine is therefore – not only a result of political and legal actors thinking that it matters, or an indication that Parliament is the core institution responsible for the generation of legal norms – a corollary of its broader symbolism. Sovereignty in the UK is not bestowed upon the constitution, upon the law, or upon the judges. Sovereignty resides in Parliament; an institution whose members are accountable to, and ultimately removable by, the electorate. While Bevir downplays the significance of this form of participation, preferring to categorise it as a restraint on popular involvement in representative institutions, it nevertheless plays a central role in the debate over juridification, and over the nature – representative, participatory or otherwise – of the constitution. For so long as the sovereignty doctrine retains currency, it displays an ultimate preference for government by elected and removable officials, rather than appointed judges, and provides a rebuttal to those who suggest that elected officials are unable to resist ‘juridification’ by emphasising that while the judicial role within the constitution is

crucial, it is also strictly limited. On this reading, the ability of the courts to restrain executive action should not be regarded as an encroachment on the democratic process, nor as a poor substitute for alternative forms of direct participation. Rather it should be seen as an alternative avenue through which governmental decisions may be challenged and, as such, an essential and defensible component of our parliamentary democracy.

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¹ See also: M. Bevir, 'The Westminster Model, Governance and Judicial Reform' [2008] *Parliamentary Affairs* 559, 573.

² See eg: *R v Secretary of State for the Home Department, ex parte Anderson* [2003] 1 AC 837, 882 and 899.

³ Lord Steyn, 'Democracy, the Rule of Law and the role of the judges' [2006] EHRLR 243, 248.

⁴ For two classic examples see: *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386; *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

⁵ See eg: R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), pp.47-48.

⁶ R. Masterman, 'Interpretations, Declarations and Dialogue: Rights Protection under the Human Rights Act and Victorian Charter of Rights and Responsibilities' [2009] *Public Law* 112, 116-118.